AAT tax update 10 December 2013

Contents

1. Were daily filing penalties for Construction Industry Scheme (CIS) failures proportionate?

In **HMRC v Anthony Bosher [2013] UKUT 579**, complex issues on the Human Rights Act and the doctrine of proportionality were considered in the context of substantial CIS penalties being imposed. The First Tier Tribunal (FTT) allowed Mr Bosher's appeal and cancelled 193 fixed penalties of £100 each on the grounds that they were disproportionate. The central issue on HMRC's appeal before the Upper tribunal is whether the Tribunal had the jurisdiction to cancel these penalties.

The legal basis of the CIS, as it has been in force from 6 April 2007, is ss 57-77 of the **Finance Act 2004** ("FA 2004") and the **Income Tax (Construction Industry Scheme) Regulations 2005** (SI 2005/2045) (the "2005 Regulations"). As Ferris J said, the CIS requires certain payments by contractors to sub-contractors to be made subject to deduction of tax, but the sub-contractors are entitled to claim credit for tax withheld under CIS against their tax liability for the tax year in question.

Contractors are required to make a return no later than 14 days after the end of every tax month (a "monthly return") (s 70 FA 2004 and reg 4 of the 2005 40 Regulations). Late filing of the return means the contractor will be liable to a penalty under s 98A of the **Taxes Management Act 1970** (TMA). The total exposure to penalty for any one return is thus a maximum of £4,200.

HMRC's policy on the 13 month penalty is:

- 1st failure - £300
- 2nd failure - £600
- 3rd failure - £900
- 4th failure - £1200
- 5th failure - £1500
- 6th and later failures - £3000.

The upper tribunal's decisions are legal precedent and it has stated its interpretation of the role of the FTT which has a wholly statutory jurisdiction. The FTT, in relation to fixed penalties, has jurisdiction under s 100B of TMA to set aside a penalty which has not in fact been incurred, or to correct a penalty which has been incurred but has been imposed in an incorrect amount, but it goes no further. In particular, neither that provision nor any other gives the tribunal a discretion to adjust a penalty of the kind imposed in *Hok* (or, it would follow, in the present case), because of a perception that it is unfair or for any similar reason. It is plain that the FTT has no *statutory* power to discharge, or adjust, a penalty because of a perception that it is unfair.

HMRC has the power to mitigate a penalty but dissatisfaction with the amount allowed by way of mitigation falls to be dealt with by judicial review. The Upper tribunal rejected the argument that judicial review does not represent an adequate and effective way to protect the taxpayer's rights. Sadly this demonstrates the difference between theory and practice. In practice, judicial review is expensive and the hurdle to overcome is that of the Wednesbury principle that the decision is so unreasonable that no reasonable person could have come to that decision. In practice, a taxpayer is unlikely to succeed at judicial review and even if the prospect of success is good it is an expensive process and does not provide adequate protection for ordinary taxpayers. But it is unlikely that any court would admit that and the Upper tribunal was not going to admit the weakness in this case. Paragraph 39 records: *"It is only if the hurdles facing a taxpayer in seeking judicial review are so great as to amount, in practice, to a denial of access to justice that the point has any validity; we cannot possibly conclude that that is so."*

I feel quite sorry for Mr. Bosher because the failure of the Upper Tribunal to recognise that most taxpayers cannot use judicial review meant he would inevitably lose the appeal. HMRC succeeded and the penalties are reinstated but then may be subject to a discretionary mitigation allowed by HMRC. But the important and substantive decision is that the FTT had no jurisdiction to decide on the concepts of fairness in regard to a fixed penalty and to answer the question posed – yes the penalty was proportionate.

2. Is it time for the Autumn Statement theatre to stop?

The Budget and the Autumn Statement are political theatre when the Chancellor often states and restates good news and pretends he is reducing taxes to considerable fanfare while raising taxes (quietly) elsewhere. He claims to be helping growth, small business and the economy. In reality he introduces changes, increases compliance costs and makes the tax regime even more voluminous and complex.

Last Sunday, I sat down before the Autumn statement to write this item. What changes had already been leaked before this statement? And how accurate were the leaked announcements? I picked a 10 high profile items:

- the recovery and growth is underway with growth revisions upward
- free school lunches for state infant schools
- tackling multinational tax avoidance (probable interest cap)
- tackling status abuse using partnerships (false self-employment)
- tackling electronic commerce abuse (no UK presence but lots of activity)
- transferrable £1200 allowance for married couples
- small business loans easier to obtain (with government backing)
- Capital Gains Tax on non-resident homes
- business rates reliefs
- tax incentives for high tech industry.

I think that it is time for the theatre of Budgets and Autumn Statements to stop. Politicians need the oxygen of publicity. But it is not good for the country. I'd recommend repealing about 90% of tax incentives and so being able to repeal a similar percentage of the voluminous anti-avoidance legislation. Simplification would produce losers who would no doubt shout loudly but in the longer term, it would reduce compliance costs and make the system appear fairer and more certain.

Stability and certainty is what this country needs. When a Chancellor announces new changes, what he is really saying is that what we had before was inadequate and I need to change things to make things better. In other words, I (or my predecessor) failed last time and I need another attempt to get things right.

3. The Autumn Statement 2013

On 5 December 2013 at 11:15 the Chancellor began to deliver his speech. He took 50 minutes to deliver a speech that did not announce anything that had not been previewed or leaked in advance.

The 130 page document can be purchased for £45 or downloaded for free. It is augmented by **these news announcements.**

To support families with the cost of living, the Chancellor announced in his Autumn Statement that the government is:

- Freezing fuel duty for the remainder of this Parliament, saving the average motorist £11 every time they fill up their tank by 2015-16.
- Introducing the married couples transferable tax allowance, benefitting eligible couples by up to £200 in 2015-16.
- Introducing reforms to save the average energy bill payer £50, whilst maintaining support for the poorest families.
- Extending free school meals to all children in reception and years 1 and 2 cap the average increase in regulated rail fares for 2014 in line with the Retail Prices Index, complementing the decision by the Mayor of London to cap average fare increases in London for 2014.

To help business grow and create jobs and to provide help for the high street, the government is:

- Introducing a cap on the Retail Prices Index (RPI) increase in business rates in England to 2% in 2014-15.
- Introducing a £1,000 business rates discount to help the high street.
- Doubling the Small Business Rate Relief for a further 12 months from 1 April 2014 to help 540,000 firms.
- Making it cheaper for businesses to employ young people by abolishing National Insurance Contributions for under-21s earning below £813 per week.
- Introducing a new tax relief for shale gas and support for the creative industries.

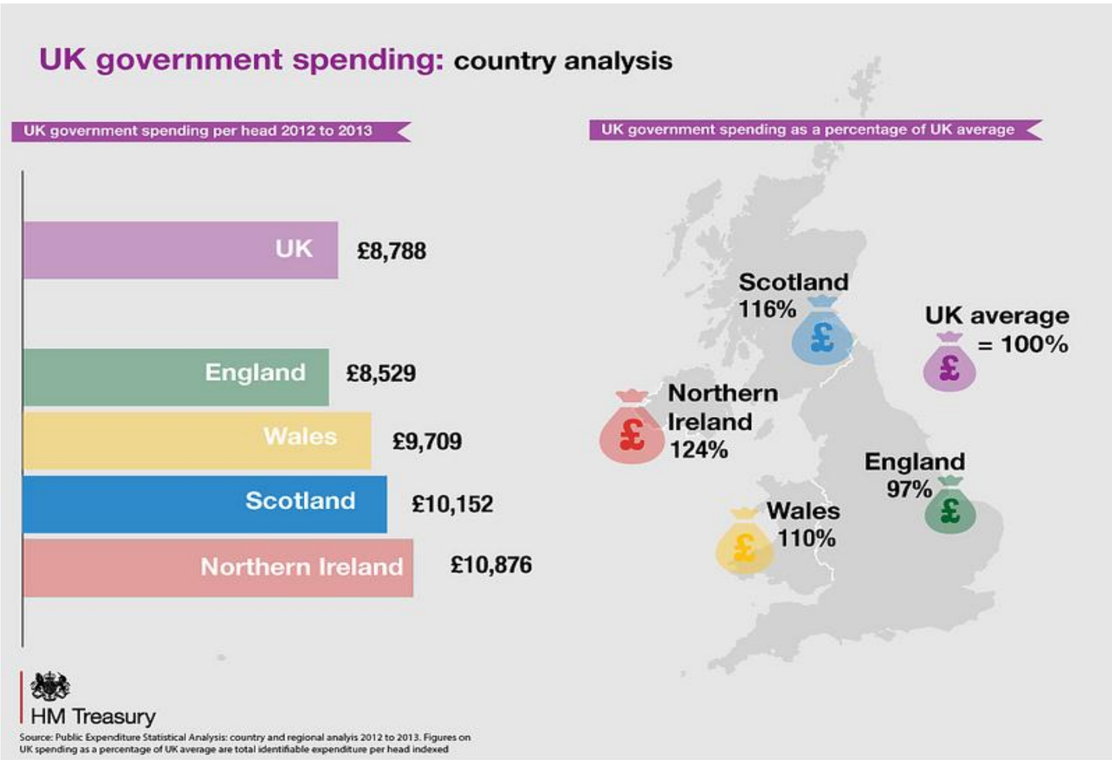
There are new info-graphics and an example of which is below showing a distribution of spending for the various regions of the UK.

As always, experience suggests that the devil will be in the detail. Reading the 130 page document, I cannot find anything else of interest to advisers or their clients. Personal allowances have increased from this year's £9440 to £10,000 and the basic rate band has narrowed from £32,010 to £31865.

Further publications are planned for the 10 December where most of the information and documents relating to the Finance Bill 2014 draft clauses will be available.

You can get all the information at:

- **Bands of taxable income and corresponding tax rates**
- **Income tax allowances**
- **National Insurance contribution thresholds**
- **Class 1 National Insurance contribution rates 2014-15**
- **Self-employed National Insurance contribution rates 2014-15**
- **Other NICs rates**
- **Working and Child Credit Tax rates and thresholds**
- **Child Benefit and Guardian's Allowance**
- **Tax-free Savings Accounts** goes up from £11,520 to £11,880
- **Fuel Benefit Charge** increases from £21,100 to £21,700
- **Van Benefit Charge** rises from £3,000 to £3,090



4. HMRC Publishes estimates of the VAT tax gap for 2012/13

The **VAT gap for 2012-13** is estimated at £12.9 billion. This equates to around 11.4 per cent of the estimated total VTTL. The VAT gap has remained between 10 per cent and 12 per cent from 2009-10 onwards.

The ‘VAT gap’ is the difference between the theoretical total VAT liability, estimated using National Accounts data, and actual cash receipts.

5. HMRC Publishes Agent Update edition 39

At 11 pages this is a recommended read. Select the links that interest you and ignore the rest.

There is a lot in it about how successful HMRC has been in tackling avoidance just as the Autumn Statement contained a lot of anti-avoidance challenges including giving HMRC the right to collect the tax up front when an avoidance scheme is being challenged.

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10 December 2013

The views expressed in these podcasts are Derek Allen's personal views and do not necessarily represent AAT policy or strategy.